Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2010

Leadership is a behavior, not a position

OPEN RECORDS DECISIONS

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Commissioner

Department of
CRIMINAL JUSTICE TRAINING
KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

KENTUCKY
LEADERSHIP
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Leadership is a behavior, not a position

The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

2010

Opinions of the Attorney General
Open Records

The following are brief summaries of Open Records Decisions made by the Office of the Kentucky Attorney General. Decisions that are appealed to the Kentucky courts are captured in the regular case law summaries provided by this agency. Unless appealed, these Decisions carry the force of law in Kentucky and are binding on public agencies. A copy of the applicable Kentucky Revised Statutes can be found at the end of the summary.

For a full copy of any of the opinions summarized below, please visit http://ag.ky.gov/civil/orom/

10-ORD-003 **In re: Carl Hatfield / City of Cumberland**
Decided January 5, 2010

Hatfield, a City Council member, requested specified records concerning the Cumberland Police Department and a particular officer. The City did not respond in three days, and Hatfield hand-delivered a second request. The City failed to respond and he appealed. The Decision agreed that the failure to respond in a timely manner was a violation. In response to the appeal, the City stated that the Mayor denied the request because she believed the repeated requests were intended to disrupt the functioning of the city, Hatfield had apparently made 40-50 requests, written and verbal, for information and documents in 2009, most of which were honored. However, the Decision noted that there is no limitation on the number of requests an applicant could seek. The Decision also noted that the law expressly requires a response within three days and that it had rarely found evidence that a request would disrupt an agency's essential functions. Although the City argued the requests were too burdensome, the record lacked any evidence to support that assertion, and a bare allegation was simply not enough. The Decision found the City in violation.

10-ORD-009 **In re: Jeff Gearding / Campbell County Fiscal Court**
Decided January 19, 2010

Gearding requested a number of records. He received a timely response and was directed to make an appointment with a named official to view the records. Gearding, however, appealed, apparently challenged the direction to come to the jail and inspect the requested records before copies would be provided. The Decision agreed that when the requestor lives and works in the same county where the records are held it was appropriate to require them to pick up the items. (A requestor who does not may request copies be mailed, so long as they precisely describe what is wanted, in effect a higher standard.) The Decision did note, however, that the response which identified some of the records as being in the custody of the jailer failed to provide the address of the jail, providing only the name and telephone number of the jailer.

10-ORD-012 **In re: Wayne C. Murphy / Russell Police Department**
Decided January 19, 2010

Murphy requested a copy of the policy and procedure for a case file of a particular case, witness statements of that case and time sheets of a named detective. Although apparently the agency did not produce the time sheets originally, they were produced before the Decision was rendered. The agency affirmatively indicated to Murphy that there was no such document as he described, nor did the officer named in the request take any witness statements. The Decision agreed that if the records do not exist, the agency could not be forced to prove the negative, unless the requestor can make a prima facie showing that the records do, in fact, exist. The Decision upheld the position of the Russell Police Department.

10-ORD-022 **In re: Kevin Brumley / City of Bardstown and Joint Board of Ethics of the Cities of Bardstown, Fairfield and the County of Nelson, Kentucky**

Brumley requested recordings of meetings of the agency named above. The agency responded by requesting a fee of $5.00 for the recordings, on CD. The record established that the true cost of the recording was far less than that amount. Brumley appealed. The agency replied that the fee was intended to offset the cost of the computer, the recorder, the batteries needed for the recorder, the CDs and the software used to reproduce the materials. Later correspondence indicated that the computer in question was used daily by the agency for other tasks. The Decision ruled that the Board subverted the intent of the Open Record Act by imposing an excessive fee for the CD recordings.

The Decision also noted that the agency did not originally receive the request (hence the appeal) because it had been directed to an officer who no longer worked for the department. Apparently the request had been forward to the officer at his new place of employment.

10-ORD-027 **In re: Brenda Lewis / Eastern Kentucky Correctional Complex**
Decided February 10, 2010

Lewis requested copies of particular duty rosters. The request was denied for security reasons, as the party which replied noted that the roster would show a pattern of staffing that will make the institution vulnerable to attack. Lewis appealed, noting that the records in question are posted on a bulletin board. The agency responded that these documents are viewed internally, and that the duty rosters are not posted in any location for consecutive dates. The Decision noted that KRS 197.025(1) gives the authority to the commissioner (or individual wardens) to deny access to documents that constitute a threat. The Decision upheld the position of the agency.

10-ORD-030 **In re: Rob Dixon / Kentucky State Police**
Decided February 11, 2010

Dixon requested records relating to an auto accident involving a named individual. Dixon was a private investigator working for the individual's attorney. He was informed that the documents would be released to him in 8 days, or he would receive a letter updating him as to the status of the request, after KSP review of the documents. The attorney also asked that the documents be released to Dixon. A week after the date the records were to be released, KSP advised the attorney that although he (the attorney) was entitled to the records under KRS 189.635, that the statute does not allow him to name a designee (Dixon) for the records. Dixon appealed. KSP provided some, but not all, of the documents requested, holding back the

accident report and photos, arguing those records are confidential and can only be released to named parties (such as the attorney). The Decision found that KSP's response was procedurally and substantively deficient - procedurally because the response was not timely, and substantively because KSP construed the provisions of KRS 189.635 too narrowly and that employees of the attorney fall under the exemption as well - holding that Dixon stands in the attorney's shoes for purposes of obtaining the document. The Decision equated the situation to that described under KRE 502(a)(4) - the attorney confidentially clause - which extends that protection to employees of the attorney as well.

10-ORD-034 In re: Janice M. Theriot / Louisville Metro Police Department
Decided February 18, 2010

Theriot requested documents from a specific professional standards case, and in particular a sworn statement from a named officer. She agreed to a delay in production of the records because they were boxed up. She subsequently received some of the documents, but not the statement or documents from the named officer, or a copy of the Standard Operating Procedure (SOP) that was requested. Following further correspondence, the agency indicated that everything that could be released had been sent. The Decision concluded that the response was, first, procedurally deficient as untimely, as it failed to explain specifically why the response was delayed. During the course of the inquiry, the OAG received a copy of the complete file and addressed each document in turn. The Decision agreed that Internal Affairs reports are protected to a great extent, so long as their documents are considered preliminary. If the deciding authority (the Chief of Police) incorporates the findings as part of the final decision, however, the findings lose their preliminary characterization and become non-exempt.

The Decision notes that when an agency's "final decision mirrors [preliminary] findings and recommendations, albeit in abbreviated form, it must logically be inferred that they were adopted as the basis of that decision, particularly where there is no persuasive proof in the record to overcome this inference." In this situation, that was not the case, even though the final decision is in accord with the recommendation of the Professional Standards Unit (PSU). The Decision also agreed with the agency's position that a witness statement is a preliminary document unless it is adopted in the final agency action. In addition, other items in the file, such as information on a particular law, was collateral to, and not part of, the investigative file, were subject to release.

10-ORD-040 In re: Yaqob T. Thomas / Lexington Fayette Urban County Division of Police
Decided March 2, 2010

Thomas requested document related to polygraph examinations on potential suspects relating to a specific homicide case. LFUCG responded, denying the records as being exempted under KRS 61.878(1)(h) and KRS 17.150(2) because the matter was still under investigation, even though an arrest had been made. Thomas appealed, arguing that since he had already been sentenced was serving time, there was no prospective law enforcement action pending. LFUCG argued that because of the possibility of post conviction motions, the records must remain exempt.

The Decision concluded that even though LFUCG had made not particular allegation of harm related to the release, that the cited statutes do apply in this action. The Decision upheld the denial of the records.

10-ORD-047 **In re: Dolly Bunch / Whitley County E-911 Center**
Decided March 9, 2010

Bunch requested a copy of a 911 recording related to a specific person, on a specific date in 2005. (The request was made in November, 2009.) Whitley County responded 11 days later, stating that it could not locate the records in question. Bunch appealed. The 911 center responded that three disks, including the requested material, were missing. The Decision found the response satisfactory, but noted concern for Whitley County's records management process. As such, the matter was referred to the Department of Library and Archives for further review.

10-ORD-057 **In re: Wayne C. Murphy / Russell Police Department**
Decided March 22, 2010

Murphy requested the policy and procedures for out of state arrests and time sheets related to two detectives, with respect to a case involving himself. He also asked for the investigative work product. He received no response, and appealed. Upon receiving notice of the appeal, Russell responded that the request was identical to an earlier request, in which the agency replied that it had no such policy and that the remainder was too vague. It noted, however, that Russell had turned over Murphy's entire file to his attorney, but that it will attempt to comply to a specific request.

The Decision noted that it was appropriate to deny records that the department did not have, but that turning over records to an attorney did not satisfy the obligation to provide records to Murphy. The Decision upheld Russell with respect to its denial of the policy and procedure, but reiterated that it had an obligation to produce the remainder of the file to Murphy, upon payment of the fees for the copies.

10-ORD-058 **In re: Jack Hurst / Nelson County Fiscal Court**
Decided March 26, 2010

Hurst requested records relating to purchases of the Nelson County Police Department for a specific year. He received invoices from the Nelson County Sheriff's Office, along with a reply that there was no such agency as the Nelson County Police Department. Hurst appealed, acknowledging the records he received, but complained that they were not the records sought. Hurst noted that he had a copy of the document that memorialized the dissolution of the police department in 2000, which transitioned the former responsibilities of that department with the Sheriff - the terms of which made the Sheriff and County Judge have equal authority over the hiring and firing of deputies in the now dual office. Hurst noted that he had evidence of at least 20 credit cards connected to the police department. In response to Hurst's appeal, the County Judge's Office responded that the police department did not exist, but that occasionally invoices reference it.

The Decision stated that if, in fact, such records exist, the County Judge was obliged to disclose them, but that it was outside the purview of the Attorney General to decide if the police department actually exists.

10-ORD-066 **In re: Chris Henson / Covington Police Department**
Decided April 5, 2010

Henson requested records relating to various offense and incident reports. Covington complied, but held back juvenile reports under KRS 610.320(3) Henson appealed. The Decision ruled that Covington was entitled to hold back the records with respect to juvenile offenders.

10-ORD-073 **In re: Kentucky New Era / Kentucky State Police**
Decided April 12, 2010

Hoffman (Kentucky New Era) requested offense reports related to a specific incident. KSP withheld the document requested, because it involved a juvenile, on the basis of KRS 610.320(3). Hoffman appealed, and KSP responded that the incident in question involved both adult and juvenile suspects, and the UOR 1 (the requested document) was designated as juvenile. After reviewing the record in camera, the Decision noted that since the report identified an adult suspect, in addition to juveniles, that it would not be properly characterized as a juvenile record. As such, KSP was entitled to hold back exempt material, but required to produce all nonexempt information.

10-ORD-075 **In re: Christopher Davenport / Kentucky State Police**
Decided April 13, 2010

Davenport requested a specific report on a use of force investigation, which was apparently prepared as a potential administrative action that was collateral to a criminal investigation. (Davenport was the subject against whom the force was used.) KSP denied the request, arguing both that the document was part of an ongoing investigation and that it was preliminary. Davenport appealed, and KSP requested that the document in question was part of the criminal investigation relating to Davenport against whom force (a Taser) was used. The charges against the subject had been dismissed, the KSP noted that the troopers may elect to pursue the underlying criminal charges further, at which time Davenport would be entitled to the report through discovery. Further, KSP argued that such reports include a deliberative process and that exempted the records from release. KSP provided a copy of the record in question to the Attorney General for in camera review, and the Decision concluded that although the report might have been preliminary initially, that it forfeited its exempt status once it was adopted by the agency as a basis for its final action." It also noted that a finding of no action being warranted was, in fact, the "final action" of the agency, which was the case. Since the report in question was implicitly adopted as the basis for that decision, the report should be released.

10-ORD-083 **In re: Carl Hatfield / City of Cumberland**
Decided April 22, 2010

Hatfield requested records concerning an investigation related to overtime paid to police officers and to records relating to the city's eligibility for grant funding to hire another officer. (See 10-ORD-003) Following an earlier request, in which Hatfield stated the City resisted his efforts to do onsite inspection of the records, and in which the records were only partially responsive, Hatfield again appealed. The Decision noted that the Attorney General was not the trier in fact of the issue, and noted that if Cumberland was dissatisfied with the earlier decision, it might appeal the decision to the court.

10-ORD-084 **In re: Deb Enneking / City of Covington**
Decided April 23, 2010

Enneking requested records for an organization known as "One Covington." Covington responded and acknowledged the request. After correspondence on the matter, Enneking was provided with some records, including emails, and denied others. Further correspondence ensued, particularly with respect to email records not provided by the City. The City responded that it would have to use an independent IT contractor to search for the archived information, and asked Enneking to be more specific. The City noted that simply searching for documents relating to "One Covington" was not a sufficiently specific request. A few days later, following more email exchanges, Enneking was told the charge would be $240, for 4 hours of the contractor's time.

Finally, a few months later, after yet further communications, Enneking appealed. The City did not contest that the information in question are public records, but reiterated that the request was open ended and vague, and related to a organization that was not affiliated with the City. The City cited to an earlier decision, but the Attorney General noted that the request in this matter was for a defined class, archived email, rather than a broad request for all types of records. The Decision stated that it was improper to ask for a requestor to pay for the time necessary to retrieve the records, as it is the City's choice whether to employ its own technology or to contract for the service. If they choose the latter, they must deal with the consequence of that decision. To the City's response that it was unfair to place the burden of the request on the taxpayers, the Decision suggested that the City might have considered that when it chose to retain the archived material is such a way that it could only be retrieved by an outside contractor.

The Decision ruled against the City's charging for the retrieval of the records.

10-ORD-086 **In re: The Times Tribune / Whitley County Sheriff's Department**
Decided April 28, 2010

Swindler (The Times Tribune) requested information concerning the number of auxiliary (special) deputies currently sworn in by the sheriff. The sheriff did not respond, and Swindler appealed. The Sheriff responded to the appeal, replying that the list of such special deputies was on file with the County Clerk's office. The Decision noted that the response was deficient and untimely. Since the belated response was, in effect, a denial, the Decision noted that the Sheriff was obligated to furnish Swindler with the name and location of the official custodian of said records, which he did not do.

The Decision also noted that since there is no such thing as an "auxiliary deputy," it is presumed that Swindler intended the request to be for "special deputies" under KRS 70.045.

10-ORD-088 **In re: James C. Puszcnewicz / Jeffersontown Police Department**
Decided April 30, 2010

Puszczewicz requested photographs, in-car video and information concerning a DUI from the Jeffersontown Police Department. The request was denied with respect to the video on the basis of KRS 189A.100(2)(k) The denial was dated 13 days after the request, well outside the required 3 days, and it failed to cite KRS 61.878(1)(l) as the justification for the denial. However, since the provisions of KRS 189A.100(2)(g) are incorporated in Open Records law, such recordings of DUI stops may only be used for a limited purpose by the prosecution or the defense. The unauthorized release of such records is official

misconduct. Since Puzzczewicz, an attorney, did not represent the driver depicted in the video, he was not entitled to a copy of the video. The Decision upheld the position of the Jeffersontown Police Department in denying the recording.

10-ORD-093 In re: Tyler Jones/Powell County Sheriff's Department
Decided May 7, 2010

Jones requested records concerning the results of fingerprint analyses done at a crime scene and other evidence, as well as video and audio recordings taken by responding officers. When he received no response from the sheriff's office, he appealed. The Sheriff's Office further did not reply to the Attorney General's request for information on the matter. The Decision noted that the custodian of records is required "to provide *particular and detailed information* in response to a request for documents." The Decision stated that the agency was required to provide requested documents unless the Sheriff's Office can articulate, in writing, a valid basis for denying the request. Failure to do so puts the agency in violation of the Open Records Act.

10-ORD-094 In re: Linda A. Smith/Lexington-Fayette Urban County Division of Police
Decided May 7, 2010

Smith requested records from LFUCG Division of Police for two criminal investigations. Initially, another individual had made a request, in 2009, and the Decision emphasized that the response given to that request was inadequate, as it did not explain why it would take extra time for the request to be processed. Ultimately, the Division responded that the records requested involved an open investigation and would be denied for that reason. (The records were also exempt under KRS 17.150(2)). In January, 2010, another request was made, the response indicated that although the subject was convicted and incarcerated, that the agency considered the case open until the sentence was completed. (In this situation, the sentence was life.) The Decision agreed that since there was still a potential for post-conviction relief, it was appropriate to hold back the records.

10-ORD-106 In re: Shane Johnson/Laurel County Clerk
Decided May 21, 2010

Johnson requested documentation of salaries of employees of the Laurel County Clerk's office. He appealed when he did not get the desired response. He did not sign the initial letter, and the Decision noted that Laurel County's request that he do so was appropriate. The Decision, however, disagreed that Laurel County's request that the requestor provide photo identification when picking up the documents. The Decision noted that all that is required is that the request be signed, that a legible name be included and that the requestor appropriately describe the documents. As the statute did not allow for the identification to be required, it could not be required.

10-ORD- 117 In re: Quincy Taylor/Kentucky State Police
Decided: June 11, 2010

Taylor (an inmate) requested a letter that he sent to a particular trooper at KSP Post 5, and the trooper's response to the letter.. When he received no response, he appealed. KSP denied having received the initial request. Further, the trooper stated he did not maintain a copy of correspondence related to the matter, although he acknowledged having written a letter to a county attorney concerning Taylor. A copy

of that, along with a copy of a dispatch log entry, were available once Taylor paid the fee for the documents. A letter which the trooper acknowledged he wrote to Taylor, but did not retain a copy of, was classified as routine correspondence and not crucial for retention, although the KDLA does provide for a 2 year retention schedule for the documents. The Decision affirmed the denial.

10-ORD-122 In re: Cynthia Easterling / Kentucky Department of Revenue
Decided June 18, 2010

Easterling requested "six items of information" from the Department of Revenue, but did not direct the request to the proper official records custodian. She received some items, but appealed, arguing that the agency's response was untimely. However, due to confusion as to who received (or failed to receive) the request, the agency argued that its response was not untimely. (The request was made to a specific employee, not the records custodian.) Because of the conflicting evidence, the Attorney General noted that it could not conclusively determine whether a violation was committed. However, because it did confirm that once the records custodian received the request, she did respond in a timely manner, the Decision found the agency to have properly complied to the request.

However, the Decision noted that the department's policy of requiring a specific form, available on its website, was improper.

10-ORD-123 In re: Russell and Sharon Loaring / Kentucky State Police
Decided June 21, 2010

The Loarings made repeated questions for documentation concerning the status of a KSP investigation into a shooting that occurred in Owenton in 2009. KSP denied the initial request, relying on KRS 17.150(2) and 61.878(1)(h) because the investigation was open. The Loarings made requests every few months, and were told in March, 2010, that the investigation had been closed in February. They submitted a request on March 19, and received no response. They made another request, a week later, and were told that they would receive documents by April 19, in fact, they received 58 pages on April 7, but no description of any records withheld or explanation as to how any exception applied to those records.

The Loarings appealed, identifying a number of records that were not provided "but of which they had independent knowledge owing to the appearance of those records in pleadings filed in related litigation." KSP responded that they were given all public records except for the 911 call and "photographs deemed so graphic as to justify nondisclosure under KRS 61.878(1)(a)." (KSP argued that it would be an invasion of privacy and cause emotional distress to the family." It did agree to release the 911 recording.

Noting the "apparent disparity in the records requested and the records produced," the Attorney General asked KSP for the entire investigative file and any records that documented the release of materials in the file "to anyone other than KSP employees" for in camera inspection. The Attorney General also requested an explanation as to how materials appeared in civil litigation prior to the "closure" of the file, when the Loarings were being denied access. KSP provided the documents and explained that the local Commonwealth Attorney, Crawford, had contacted the investigator about the case, as he was contemplating representing a party in civil litigation related to the case. That investigator had provided a copy of the file to Crawford, apparently as a courtesy. (Ultimately, Crawford withdrew as counsel for the party.) KSP noted that there was nothing in the documentation concerning the conversation or the release of the material to Crawford.

The Attorney General found "KSP's disposition of the Loarings' requests troubling" and identified several violations of the Open Records law. First, it found KSP's responses untimely, requiring the Loarings to submit the request a second time. KSP stated it would provide the documents but provided no explanation as to why it was anticipated to take so long. The Attorney General also faulted the response that provided no explanation as to the withheld documents, of which the Loarings were aware. The Attorney General found no support for withholding the photographs beyond a bare assertion that "the privacy interest of surviving family members outweighed the public's interest in disclosure." It also faulted KSP for inadvertent omission of certain documents, and found that until all of the records have been released, KSP's obligations would not be "fully discharged."

Finally, the Attorney General noted that since the detective had concluded that the release of records to Crawford, in the spring of 2009, made it "difficult to understand how the agency's investigation could have been harmed by disclosure to the Loarings or other requestors." The "law does not presume investigating records are closed" to release, although it is certainly appropriate to review a file to ensure that material that might actually harm the investigation are not released. The Attorney General concluded that withholding the material after its release to Crawford was improper.

10-ORD-130 In re: Gary Wayne Hall, Jr. / Laurel County Fiscal Court
Decided July 6, 2010

Hall requested a copy of a letter he wrote to the Laurel County Fiscal Court asking that his name be withdrawn for consideration for an appointment to a vacant constable's position, as well as copies of documents relating to a particular individual and a company. The County Judge-Executive, Kuhl, responded that he would try to locate the letter, but denied the remainder of the request, citing that the financial records requested were part of a continuing civil / criminal investigation.

The Court agreed that Kuhl's inability to produce the letter suggested a "failure to establish an effective system for ensuring records preservation," but did not find it a violation of Open Records. (It noted that the letter would have been classified as routine correspondence and failure to keep it, or explain why it did not have it, might be presumed to be records mismanagement.) It did, however, find the remainder of the response to be flawed, as the response did not cite the "specific exception" authoring the denial of the records. Specifically, it noted that the protections provided for investigation records do not extend to "financial and operational records" and that the public has a right to "records of disbursements made by a public agency to attorneys hired to represent it" – although records of attorneys or related services that relate to substantive matters protected by attorney-client privilege could be withheld.

The Decision ruled in favor of Hall.

10-ORD-144 In re: Dolly Bunch / Whitley County Sheriff
Decided July 19, 2010

Bunch requested a copy of a police report related to the death of her son in 2005. She received no response and appealed. The Attorney General contacted the Whitley County Attorney to "inquire whether any response would be forthcoming." The County Attorney stated that he thought the report had been provided and that he would provide a copy of the transmittal letter, but none was provided and telephone

calls were not returned. Since no exception to the rule had been provided, and no report apparently provided to Bunch, the Attorney General found the Whitley County Sheriff to be in violation.

10-ORD-161 In re: Corbin News Journal / Whitley County Police Department / 911 Communications.
Decided August 18, 2010

Manning (Corbin News Journal) requested radio traffic to and from Whitley 911 and the CAD report related to an injury to a child. In its response, the 911 center cited KRS 610.340(3), which protects juvenile court records. In his response to the Corbin News Journal's appeal, the 911 center also referenced HIPAA and noted that the child's guardian had requested no media attention. In previous similar cases, the Attorney General had attempted to strike a balance between the public's right to insure that a public entity was "properly discharging its statutory functions" and the privacy rights of victims. In this case, the Decision found that the attempt to show that the juvenile's privacy rights were superior were "largely unpersuasive." Specifically, it found that the statute "has no application to records generated by and for 911 Communications." With respect to HIPAA, it noted that a prior decision had "concluded that public agencies that are 'covered entities' must disclose health information, under the 'required by law' exception to HIPAA, to the extent that disclosure is required by the Kentucky Open Records Act." It agreed that a partial redaction of such records might be appropriate, on a case by case basis and related to medical condition and specific injuries, but that wholesale withholding was not."

10-ORD-162 In re: J. Todd P'Pool / City of Nortonville
Decided August 19, 2010

P'Pool (the Hopkins County Attorney) requested a number of specific financial and operational records from the City of Nortonville. The City invoked KRS 61.878(1)(h) on behalf of KSP, arguing that matters reflected in the records were under investigation and that harm might occur from premature disclosure of the records. However, the Decision noted that "any existing records" "were prepared independent of the ongoing criminal investigation, rather than 'compiled in the process of detecting and investigating statutory or regulatory violations.'" As such, reliance on the statute was misplaced. In further communications with the Mayor, P'Pool indicated that he did not wish to impede the City's review, but that he would be moving forward with his own inquiry and when that was completed, that he would be issuing a full report on the matter. (He also announced his intentions in a press release.) He repeated his request for ten specific categories of records, which the City Attorney denied in its entirety, challenging P'Pool's authority to make such an inquiry. The City Attorney argued that the matter was under investigation by KSP and the release of the records would compromise that investigation.

The Decision, while agreeing that disclosure might harm the investigation, held the documents in question were not exempt under the statute in question because they were not created or compiled because of the investigation. It did agree, however, that the City was under no obligation to provide "information" or create any records to respond to the request, and that some information might be redactable from the records in question, provided it meets another exception.

10-ORD-165 **In re: Supriya Vasanth/Kentucky State Police**
Decided: August 26, 2010

Vasanth requested records relating to a 2003 murder in Madisonville. Although the underlying conviction in the case is still subject to the appellate process, KSP did provided a number of records after obtaining the prosecutor's consent. KSP did deny polygraph records and "rap sheets," as well as other items not in KSP's possession such as reward posters and court records. Vasanth appealed the denial. The Decision, however, did not affirm KSP's decision to redact certain information from the records, such as the addresses and phone numbers of the witnesses, without further "particularized showing" of the invasion of privacy. (It affirmed the redaction of social security numbers and dates of birth.)

The Decision affirmed the KSP's refusal to honor her request for the polygraph and criminal records documents, as the Attorney General had recognized the implied confidentiality of polygraph records. It agreed that KRS 17.150(4) authorized the nondisclosure of centralized criminal history records as well.

10-ORD-172 **In re: Henry Crawford/Kentucky State Police**
Decided September 8, 2010

Crawford requested records from KSP concerning "all scientific testing and laboratory reports pertaining to him." KSP timely replied and denied the request, noting that all records responsive to the request pertain to DNA reports pertaining to his criminal conviction that was currently under appeal. The Decision affirmed KSP's position, finding that DNA identification records are exempted from the Open Records Act by virtue of KRS 17.175(4).

10-ORD-176 **In re: David M. Chapman/Cabinet for Health and Family Services**
Decided: September 8, 2010

Chapman requested records from the Cabinet concerning a deceased individual, Lazlo Hirsch. The requestor, an attorney, represented the decedent's spouse, Valeria Hirsch, in a wrongful death action. Apparently, the Cabinet sought to withhold the records under HIPAA in an earlier dispute, but the Decision noted that HIPAA privacy protections end at death, and HIPAA is no impediment to a release of the records requested. In a response to the current denial, the Cabinet depended upon the position that KRS 194A.060 only permitted the release of records to an administrator of the estate, Ms. Hirsch is not the administrator of her husband's estate in this case.

The Decision disagreed with the Cabinet, however, noting that the "linchpin in the Cabinet's argument fails, however, because 08-ORD-166 establishes that the Open Records Law is determinative of the issue of access under the "required by law" exception to HIPAA's privacy rule." The Decision concluded that withholding of the records was not permitted.

10-ORD-177 **In re: Autumn C. Barber/Education and Workforce Development Cabinet**
Decided: September 8, 2010

Barber requested records from the Education and Workforce Development Cabinet about a grievance she filed concerning the hiring process for a particular position. She was given only two of the requested items and appealed. The Decision noted that the Cabinet's reliance on KRS 61.878(1)(i) and 9(j) was misplaced, even though the documents were purportedly preliminary in nature, because they relate specifically to the

requesting party. However, the Cabinet responded that the documents she requested actually related to the investigation of another person, the successful applicant, although it was her grievance that spurred the investigation. Further, the Cabinet argued that the materials were prepared in anticipation of litigation, and thus exempt, and that the investigator's final report was made by legal counsel to the Cabinet and exempt under attorney-client privilege.

The Decision, however, summarized the situation as follows - the investigation was triggered by Barber's grievance and the investigator was not an attorney, but an EEO coordinator. The Decision concluded that the report was not exempt attorney work product. The Decision also noted that as a public agency employee, Barber actually had greater rights to access to the records in question, so long as she is not the one under investigation. In addition, the employee was entitled to review records relating to investigations that the employee initiated, as was the case here. Further, the Decision stated that there is no litigation exception to the Open Records Act, and records cannot be withheld simply because litigation is pending.

Finally, the Decision noted that records can only be withheld under KRE 503(b), the attorney-client privilege, when "all three of the following elements are present: 1) relationship of attorney and client; 2) communication by or to the client relating to the subject matter upon which professional advice is sought; and 3) the confidentiality of the expression for which the protection is claimed." The Decision concluded the records in that case did not satisfy all three and thus could not be withheld from the requestor.

10-ORD-185 In re: In re: Donald Sargent/Department of Corrections Division of Probation and Parole 12th District
Decided: September 16, 2010

Sargent requested records from the Department of Corrections, but did not properly address the request. When he appealed, the agency quickly rectified the situation and provided a proper response, notifying him that the records were available and could be mailed as soon as payment was received. It also indicated the part of the request which requested records they did not have, and gave the agency and address to be used for a request for those records. The Decision agreed the agency's response was appropriate.

10-ORD-187 In re: Casey Puckett/Montgomery County Coroner
Decided: September 17, 2010

Puckett requested a copy of annual statistical reports from the county coroner, Johnson. Johnson did not create such reports and as such, was not obligated to produce it. Johnson did ultimately provide records that were responsive to her request, including "investigation reports" created by deputy coroners during a 20-month period. (Initially, apparently, that request was denied, but since the records were produced, the issue was moot.)

The confusion about the report arose because the document is listed on the records retention schedule produced by the Kentucky Department of Library and Archives. However, the Kentucky Coroner's Act of 1978 (codified in KRS 72) does not require that the coroner actually produce such reports. The Decision upheld the denial of a non-existent record.

10-ORD-188 **In re: Michael A. Peak/Kentucky State Police**
Decided: September 20, 2010

Peak requested a copy of the DNA profile received on a particular sample by Dr. Craig (Medical Examiner's Office) from the FBI. The request was made to the Kentucky State Police. The KSP characterized it as relating to a DNA sample and rejected it. Peak argued that KSP did not create the report he requested, but KSP argued it was exempt from disclosure under KRS 17.175(4). However, the KSP also stated that it was actually not in possession of the document, anyway and it was not obligated to produce a record it does not have. The Decision agreed that the statute does exempt DNA identification records from disclosure. The Decision agreed that KSP should have responded that it was not in possession of the record, but otherwise upheld its decision.

10-ORD-189 **In re: Jeff Ross/City of Salyersville**
Decided: September 20, 2010

Ross requested payroll records for all employees of Salyersville, including the Mayor, for the month of July, 2010. The city responded that the request was not sufficiently specific and denied the request, asking that Ross tell them which records he wished to inspect. The Decision compared the issue to that in Com. v. Chestnut, 250 S.W.3d 655, 661 (Ky. 2008), in which it noted that a requestor could not be more specific when requesting documents with which they were not familiar. The city expressed doubt that it had time cards and payroll worksheets, and the Decision agreed if he did not have such records it could not produce them. However, if it kept records that weren't so designated, but which served the same purposes, it was obligated to produce them, after redacting personal information. The Decision held the denial of the request to be improper.

10-ORD-193 **In re: Sally Wasielewski/Lexington-Fayette Urban County Government**
Decided: September 29, 2010

Wasielewski requested records of LFUCG police and ABC enforcement actions related to a specific location (a city block) during a four-month period in 2010. LFUCG's police records custodian characterized the request as a "blanket request" and denied it, apparently because of her purported use of the term "any and all." The Decision noted that she did not use that phrase, and even if she did, it was properly modified by the specific modifying language she used. In addition, the LFUCG also objected to her direction of her request to the Department of Law (rather than the official custodian of the police records, who responded), but the Decision noted that if there is confusion about the scope of a request, it is appropriate to request clarification, not simply deny the request. The Decision found that the request was improperly denied.

10-ORD-195 **In re: Anthony Mattingly / Kentucky State Police**
Decided September 30, 2010

Mattingly requested a copy of the "police report" he made through a KSP trooper while he was at the Little Sandy Correctional Complex, on a complaint of identity theft. He received a KSP form 313, which acknowledged it was under investigation, but he discovered that was insufficient to satisfy the guidelines of the Fair Credit Report Act. As such, he appealed, and then received a copy of the KYIBRS report, which he challenged, arguing that the information in it was not accurate or complete. He then asked for a "COMPLETED" Report, which KSP wished to hold back as it was a current and open investigation. Mattingly further asserted that the report was incomplete and minimized the value of the identify theft claim.

It also failed to indicate the compromised accounts and amounts which are required by the FCRA. The Attorney General requested the entire investigative file for in camera review. The Decision noted that it could not judge a dispute regarding any disparity between records and that his complaints could not be addressed by an Open Records forum.

In addition, Mattingly challenged the $2 charge for KSP 313 reports. KSP explained that the form was created many years prior to satisfy requests for documents to help victims with insurance issues, while still not releasing documents that might compromise the investigation. (Because the requestor indicated in his appeal he was not concerned about the fee, and because his request was for a specific document and not information, the Decision did not further address it address it.)

10-ORD-203 In re: Phillip A. Wells/Oldham County Police Department
Decided October 21, 2010

Wells had made multiple requests for copies of three named officers' records. After the second request, the agency told him that they would no longer respond to his requests because it placed an unreasonable burden on them to "produce often incalculable numbers of widely dispersed and ill-defined public records." It also claimed that the requests were intended to disrupt its essential functions. The Decision noted that the agency "cannot avoid its duty through a claim of unreasonable burden or an intent to disrupt its essential functions" without proof. Repeated requests, standing alone, do not amount to harassment, since every request is, to some extent, an inconvenience to the staff. To decide if it is unreasonably burdensome, two competing interests must be evaluated - that of the public and that of the agency. The Decision agreed that Wells was not permitted to do a "standing request" - as he is only entitled to records that have already been created. He properly implemented this rule by submitting the requests for records created since his last request. It noted that the request was for personnel records, and the agency had twice before complied with the same request. The Decision found that he was entitled to the records.

10-ORD-209 Antoinette Taylor / Shelbyville Police Department
Decided October 26, 2010

Taylor requested data regarding two incidents and was provided with the KYIBRS report for each. (She was also referred to Shelby County E-911 Communications for further information. The department fully disclosed all responsive documents, redacting only personal information. The department, however, did not respond within the required three day period, but in fact, the response took approximately two weeks. The Decision agreed it was a procedural violation to make the untimely response, but found no other violations.

10-ORD-212 Travis Brian Lock / Louisville Fire Department - Metro Arson Squad
Decided November 1, 2010

Clay requested (on behalf of Lock) from the Louisville Fire Department's Arson Squad, all documents related to a particular fire that had occurred in 2006, including emails exchanged between the commander of the squad and other entities. The alleged perpetrator had been convicted in July, 2010, but the conviction was immediately appealed. The Fire Department denied the records, citing KRS 17.750(2) and KRS 61.878(1)(h), arguing that the possibility of "further judicial proceedings" remained "a significant prospect." The Decision upheld the denial of the records.

10-ORD-214 In re: Pamela Bishop/Louisville Metro Police Department
Decided November 5, 2010

Bishop requested records from the Louisville Metro Police Department related to the employment application and background check of a specific officer, as well as disciplinary and specified training records. When she did not receive a response (after approximately 12 days), she appealed, also complaining that she had not received a record she had requested three weeks prior to this request. (She did receive the items but not within the three days required for a response.) At the time of the appeal, the department had provided all responsive records it had in its possession, claiming that it was unaware of the request until he received the appeal.

LMPD denied the requested for the background check and employment application based upon KRS 15.400. The Decision upheld that withholding based upon the statute, specifically referencing earlier Decisions, 00-ORD-118 and 03-ORD-043. However, in a footnote, the Decision noted that normally, personnel records are subject to disclosure, and that it was unclear whether LMPD had a separate document that could be characterized as an application, as opposed to a background investigation and suggested that such a document would be subject to release, after appropriate personnel information was redacted.

10-ORD-221 In re: Antoinette Taylor / Shelby County E Brown911 Communications
Decided November 14, 2010

Taylor requested data and dispatch records related to a specific run, from the Shelby County E911 Communications Center. Upon appeal, the Decision reiterated that a "blanket policy of nondisclosure of 911 dispatch records was not lawful, despite Shelby County argument that "unfettered public access" to such records might "result in public ridicule of the occupants" of the location and might cause false runs to be generated, which would then be published to the world. The Decision noted that speculation was insufficient and that since she only requested dates and times of runs, the 911 center was obligated to release such portions of recordings as were responsive to the request.

10-ORD-225 In re: Kathy Gilliam / Kentucky Department of Fish and Wildlife Resources
Decided December 2, 2010

Gilliam requested a copy of the "video complaint" - a videotaped interview with a subject and his family - filed with respect to events surrounding the subject's arrest. The Department of Fish and Wildlife denied the request, arguing that it concerned an active investigation, under KRS 61.878(1)(h). However, in a follow-up, Gilliam reiterated that the request concerned an allegation of misconduct by an officer and had nothing to do with the court proceeding on the underlying arrest. The Decision agreed that without further evidence that the complaint was "compiled in the process of detecting or investigating the criminal charges" and that premature disclosure would harm that case, that the "criminal matter is separate and apart from the complaint" against the officer. The Decision noted that the above exception was cited only to withhold records relating to the criminal violation, and that the response did not raise the potential administrative pending process. Given that the subject was, of course, well familiar with the contents of the complaint, having made it, the Decision needed an explanation as to how premature disclosure of the contents could harm any investigation - and noted that "such a showing would have been difficult, if not impossible, to make. The Decision found the Department in violation.

10-ORD-227 **In re: Terry Brogan / Education and Workforce Development Cabinet**
Decided December 8, 2010

Brogan requested all records regarding several positions posted by the Education and Workforce Development Cabinet in October, 2010. The Cabinet provided 128 pages, which included documents related to the successful applicants, but did withhold records relating to unsuccessful applicants. The Cabinet, however, did fail to release certain records that should have been provided, but released them immediately upon appeal. The Decision agreed it was appropriate to deny the records relating to unsuccessfully applicants, pursuant to Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co., 826 S.W.2d 324 (Ky. 1992).

KENTUCKY

Open Records

61.870 Definitions for KRS 61.872 to 61.884

As used in KRS 61.872 to 61.884, unless the context requires otherwise:

(1) "Public agency" means:

(a) Every state or local government officer;

(b) Every state or local government department, division, bureau, board, commission, and authority;

(c) Every state or local legislative board, commission, committee, and officer;

(d) Every county and city governing body, council, school district board, special district board, and municipal corporation;

(e) Every state or local court or judicial agency;

(f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;

(g) Any body created by state or local authority in any branch of government;

(h) Any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;

(i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;

(j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and

(k) Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection;

(2) "Public record" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. "Public record" shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities, programs, or operations funded by state or local authority;

(3) (a) "Software" means the program code which makes a computer system function, but does not include that portion of the program code which contains public records exempted from inspection as provided by KRS 61.878 or specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records in the public agency's computer system.

(b) "Software" consists of the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs, but does not include that material which is prohibited from disclosure or copying by a license agreement between a public agency and an outside entity which supplied the material to the agency;

(4) (a) "Commercial purpose" means the direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee.

(b) "Commercial purpose" shall not include:

1. Publication or related use of a public record by a newspaper or periodical;
2. Use of a public record by a radio or television station in its news or other informational programs; or
3. Use of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties;

(5) "Official custodian" means the chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control;

(6) "Custodian" means the official custodian or any authorized person having personal custody and control of public records;

(7) "Media" means the physical material in or on which records may be stored or represented, and which may include, but is not limited to paper, microform, disks, diskettes, optical disks, magnetic tapes, and cards; and

(8) "Mechanical processing" means any operation or other procedure which is transacted on a machine, and which may include, but is not limited to a copier, computer, recorder or tape processor, or other automated device.

61.871 Policy of KRS 61.870 to 61.884; strict construction of exceptions of KRS 61.878

The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

61.8715 Legislative findings

The General Assembly finds an essential relationship between the intent of this chapter and that of KRS 171.410 to 171.740, dealing with the management of public records, and of KRS 11.501 to 11.517, 45.253, 171.420, 186A.040, 186A.285, and 194B.102, dealing with the coordination of strategic planning for computerized information systems in state government; and that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of these statutes. The General Assembly further recognizes that while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in this chapter, some being exempt under KRS 61.878.

61.872 Right to inspection; limitation

(1) All public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right. No person shall remove original copies of public records from the offices of any public agency without the written permission of the official custodian of the record.

(2) Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency.

(3) A person may inspect the public records:

(a) During the regular office hours of the public agency; or
(b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

(4) If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.

(5) If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

(6) If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

61.874 Abstracts, memoranda, copies; agency may prescribe fee; use of nonexempt public records for commercial purposes; online access

(1) Upon inspection, the applicant shall have the right to make abstracts of the public records and memoranda thereof, and to obtain copies of all public records not exempted by the terms of KRS 61.878. When copies are requested, the custodian may require a written request and advance payment of the prescribed fee, including postage where appropriate. If the applicant desires copies of public records other than written records, the custodian of the records shall duplicate the records or permit the applicant to duplicate the records; however, the custodian shall ensure that such duplication will not damage or alter the original records.

(2) (a) Nonexempt public records used for noncommercial purposes shall be available

for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format. Nonexempt public records used for noncommercial purposes shall be copied in standard hard copy format where agencies currently maintain records in hard copy format. Agencies are not required to convert hard copy format records to electronic formats.

(b) The minimum standard format in paper form shall be defined as not less than 8 1/2 inches x 11 inches in at least one (1) color on white paper, or for electronic format, in a flat file electronic American Standard Code for Information Interchange (ASCII) format. If the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public record may be provided in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request.

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.

(4) (a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following:

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;

2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

(5) It shall be unlawful for a person to obtain a copy of any part of a public record for a:

(a) Commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required by the public agency pursuant to subsection (4)(b) of this section; or

(b) Commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or

(c) Noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television

station shall not be held to have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast, unless it has also given its express permission for that commercial use.

(6) Online access to public records in electronic form, as provided under this section, may be provided and made available at the discretion of the public agency. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, a public agency may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements. Fees shall not exceed:

(a) The cost of physical connection to the system and reasonable cost of computer time access charges; and

(b) If the records are requested for a commercial purpose, a reasonable fee based on the factors set forth in subsection (4) of this section.

61.8745 Damages recoverable by public agency for person's misuse of public records

A person who violates subsections (2) to (6) of KRS 61.874 shall be liable to the public agency from which the public records were obtained for damages in the amount of:

(1) Three (3) times the amount that would have been charged for the public record if the actual commercial purpose for which it was obtained or used had been stated;

(2) Costs and reasonable attorney's fees; and

(3) Any other penalty established by law.

61.876 Agency to adopt rules and regulations

(1) Each public agency shall adopt rules and regulations in conformity with the provisions of KRS 61.870 to 61.884 to provide full access to public records, to protect public records from damage and disorganization, to prevent excessive disruption of its essential functions, to provide assistance and information upon request and to insure efficient and timely action in response to application for inspection, and such rules and regulations shall include, but shall not be limited to:

(a) The principal office of the public agency and its regular office hours;
(b) The title and address of the official custodian of the public agency's records;
(c) The fees, to the extent authorized by KRS 61.874 or other statute, charged for copies;
(d) The procedures to be followed in requesting public records.

(2) Each public agency shall display a copy of its rules and regulations pertaining to public records in a prominent location accessible to the public.

(3) The Finance and Administration Cabinet may promulgate uniform rules and regulations for all state administrative agencies.

61.878 Certain public records exempted from inspection except on order of court; restriction of state employees to inspect personnel files prohibited

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;
(b) Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute;
(c) 1. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;

2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

a. In conjunction with an application for or the administration of a loan or grant;
b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;
c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or
d. For the grant or review of a license to do business.

3. The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or publication of which is directed by another statute;

(d) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection;
(e) Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods;
(f) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to acquisition of property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision;
(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again;
(h) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public

records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884;

(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;

(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;

(k) All public records or information the disclosure of which is prohibited by federal law or regulation; and

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.

(2) No exemption in this section shall be construed to prohibit disclosure of statistical information not descriptive of any readily identifiable person.

(3) No exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him. The records shall include, but not be limited to, work plans, job performance, demotions, evaluations, promotions, compensation, classification, reallocation, transfers, layoffs, disciplinary actions, examination scores, and preliminary and other supporting documentation. A public agency employee, including university employees, applicant, or eligible shall not have the right to inspect or to copy any examination or any documents relating to ongoing criminal or administrative investigations by an agency.

(4) If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.

(5) The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function.

61.880 Denial of inspection; role of Attorney General

(1) If a person enforces KRS 61.870 to 61.884 pursuant to this section, he shall begin enforcement under this subsection before proceeding to enforcement under subsection (2) of this section. Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response

shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

(2) (a) If a complaining party wishes the Attorney General to review a public agency's denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection. If the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request. The Attorney General shall review the request and denial and issue within twenty (20) days, excepting Saturdays, Sundays and legal holidays, a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884.

(b) In unusual circumstances, the Attorney General may extend the twenty (20) day time limit by sending written notice to the complaining party and a copy to the denying agency, setting forth the reasons for the extension, and the day on which a decision is expected to be issued, which shall not exceed an additional thirty (30) work days, excepting Saturdays, Sundays, and legal holidays. As used in this section, "unusual circumstances" means, but only to the extent reasonably necessary to the proper resolution of an appeal:

1. The need to obtain additional documentation from the agency or a copy of the records involved;
2. The need to conduct extensive research on issues of first impression; or
3. An unmanageable increase in the number of appeals received by the Attorney General.

(c) On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed.

(3) Each agency shall notify the Attorney General of any actions filed against that agency in Circuit Court regarding the enforcement of KRS 61.870 to 61.884. The Attorney General shall not, however, be named as a party in any Circuit Court actions regarding the enforcement of KRS 61.870 to 61.884, nor shall he have any duty to defend his decision in Circuit Court or any subsequent proceedings.

(4) If a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.

(5) (a) A party shall have thirty (30) days from the day that the Attorney General renders his decision to appeal the decision. An appeal within the thirty (30) day time limit shall be treated as if it were an action brought under KRS 61.882.

(b) If an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision shall have the force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained.

61.882 Jurisdiction of Circuit Court in action seeking right of inspection; burden of proof; costs; attorney fees

(1) The Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county

where the public record is maintained shall have jurisdiction to enforce the provisions of KRS 61.870 to 61.884, by injunction or other appropriate order on application of any person.

(2) A person alleging a violation of the provisions of KRS 61.870 to 61.884 shall not have to exhaust his remedies under KRS 61.880 before filing suit in a Circuit Court.

(3) In an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to KRS 61.880(5)(a), the court shall determine the matter de novo. In an original action or an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to KRS 61.880(5)(a), the burden of proof shall be on the public agency. The court on its own motion, or on motion of either of the parties, may view the records in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

(4) Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.

(5) Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect or copy said public record. Attorney's fees, costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.

61.884 Person's access to record relating to him

Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878.